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10 UNITED STATES DISTRICT COURT
11 EASTERN DISTRICT OF WASHINGTON

12 THE CINCINNATI INSURANCE
13 COMPANY, an Ohio corporation; and
14 THE CINCINNATI INDEMNITY
15 COMPANY, an Ohio corporation,

16
17 Plaintiffs,

18 vs.

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20 ZAYCON FOODS, LLC, a Washington
21 Limited Liability Company; FRANK
22 MARESCA and JANE DOE MARESCA,
23 husband and wife; MICHAEL GIUNTA
24 and JANE DOE GIUNTA, husband and
25 wife; MIKE CONRAD and JANE DOE
26 CONRAD, husband and wife; ADAM
27 KREMIN and JANE DOE KREMIN,
28 husband and wife; and RICHARD
BRADDOCK, an individual,

29
30 Defendants.
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No. 2:17-cv-0140-SMJ

**ZAYCON DEFENDANTS’
CROSS-MOTION FOR
SUMMARY JUDGMENT ON
DUTY TO DEFEND AND
RESPONSE TO PLAINTIFFS’
MOTION FOR SUMMARY
JUDGMENT**

Hearing: 2/12/2018
Without Oral Argument

Expedited Hearing Requested

1 The Zaycon Defendants¹ oppose Plaintiffs' Motion for Summary
 2 Judgment and cross-move for summary judgment on the duty to defend. For
 3 the reasons indicated below, this Court should enter an Order declaring
 4 Plaintiffs have a duty to defend the Zaycon Defendants.
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 8 Plaintiffs Cincinnati Insurance Company and Cincinnati Indemnity
 9 Company ("Cincinnati") seek a declaratory judgment that they have no duty to
 10 defend or indemnify the Zaycon Defendants in the underlying lawsuit,
 11 *Braddock v. Zaycon Foods, LLC, et al.*, United States District Court for the
 12 Western District of Washington, Case No. 16-cv-01756-TSZ ("Underlying
 13 Suit"). However, Cincinnati owes the Zaycon Defendants a duty to defend as a
 14 matter of law based upon potential liability for damages for a "personal or
 15 advertising injury." *See Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 52-
 16 53, 164 P.3d 454 (2007) (the duty to defend is premised on "*the potential for*
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25 ¹ The Zaycon Defendants include Zaycon Foods, LLC, a Washington Limited
 26 Liability Company; Frank Maresca and Jane Doe Maresca, husband and wife;
 27 Michael Giunta and Jane Doe Giunta, husband and wife; Mike Conrad and
 28 Jane Doe Conrad, husband and wife; and Adam Kremin and Jane Doe Kremin,
 29 husband and wife.
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1 *liability*” and the insurer must “give the insured the benefit of the doubt”). A
 2 reasonable interpretation of the allegations of the Underlying Suit that the
 3 Zaycon Defendants “falsely and fraudulently told [shareholders] that Braddock
 4 was opposed to the deal with Great Hill and that he would kill it,” and extrinsic
 5 facts that Mr. Braddock told a business acquaintance the Zaycon Defendants
 6 had damaged his reputation, conceivably could result in coverage for the
 7 “personal or advertising injury” of defamation. (*See* Zaycon Defendants’
 8 Statements of Fact (“SOF”) Nos. 2, 7, 9-11.) Additionally, a determination of
 9 Cincinnati’s duty to indemnify is untimely as actual liability in the Underlying
 10 Suit has yet to be determined. *See Safeco Ins. Co. of America v. McGrath*, 42
 11 Wn. App. 58, 61, 708 P.2d 657 (1985) (the duty to indemnify arises “only
 12 where the injured party ultimately prevails [against the insured] on facts which
 13 fall within the policy coverage”). Consequently, this Court should deny
 14 Cincinnati’s Motion for Summary Judgment and grant the Zaycon Defendants’
 15 Cross-Motion for Summary Judgment.

26 **FACTUAL BACKGROUND**

27 Cincinnati filed a Complaint for Declaratory Relief on April 13, 2017,
 28 seeking a declaration that it has no duty to defend, indemnify or pay sums to or
 29 on behalf of any defendant with respect to the Underlying Suit. (ECF No. 1.)
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1 The policies Cincinnati issued to Zaycon provide coverage for “bodily injury,”
2 “property damage,” employee benefit liability, “personal and advertising
3 injury,” along with certain umbrella coverages (“Policies”). (Zaycon
4 Defendants’ SOF No. 1.)
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8 As it relates to “personal and advertising injury,” these Policies provide:
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10 We will pay those sums that the insured becomes legally
11 obligated to pay as damages because of “personal and
12 advertising injury” to which this insurance applies. We
13 will have the right and duty to defend the insured against
14 any “suit” seeking those damages.

15 (Zaycon Defendants’ SOF No. 2.) In turn, the definition of “personal and
16 advertising injury” includes:
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18 Oral or written publication, in any manner, of material
19 that slanders or libels a person or organization or
20 disparages a person’s or organization’s goods, products
21 or services.
22

23 (*Id.*)
24

25 Richard Braddock initiated the Underlying Suit against the Zaycon
26 Defendants on November 14, 2016 via a complaint (“Underlying Complaint”).
27 (Zaycon Defendants’ SOF No. 3.) The factual allegations of the Underlying
28 Suit revolve around Richard Braddock’s investment in Zaycon (an e-commerce
29 food distributor), rise to chief executive officer (“CEO”), and subsequent
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1 removal from Zaycon. (*Id.*) In the Underlying Complaint, Mr. Braddock goes
 2 to great lengths to document his business experience, pedigree, and reputation.
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 4 (Zaycon Defendants' SOF No. 4.)
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6 In October 2015, Mr. Braddock became the CEO of Zaycon. (Zaycon
 7 Defendants' SOF No. 5.) According to Mr. Braddock, under his leadership,
 8 Zaycon's revenues grew substantially. (*Id.*) However, the Underlying
 9 Complaint alleges that in either late 2015 or early 2016, Zaycon retained
 10 Vertical Group to seek additional investment. (Zaycon Defendants' SOF No. 6.)
 11
 12 The Underlying Complaint further alleges that after Zaycon retained the Vertical
 13 Group, the Great Hill Partners submitted a proposal to buy into Zaycon at
 14
 15 \$25,000,000.00. (*Id.*)
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20 The Underlying Complaint contains multiple factual allegations
 21 documenting the Great Hill deal and subsequent ouster of Mr. Braddock:
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24 91. Braddock advised Defendants and Vertical and
 25 Shwarts that he believed that the Great Hill deal could be
 26 improved through negotiation but that he was strongly in
 27 favor of coming to terms with Great Hill.

28 . . .

29 100. Defendants Maresca, Giunta, Conrad and Kremin
 30 understood that Zaycon was desperately in need of a
 31 capital infusion.

32 101. However, they feared that Great Hill's investment
 would change the power structure in the company.

1 . . .

2 104. Accordingly, Defendants Maresca, Giunta, Conrad
3 and Kremin commenced looking for a way to get rid of
4 Braddock but to hold onto Great Hill

5 . . .

6 111. . . . [A]lthough it had been Braddock's leadership
7 and money which had put Zaycon on a trajectory to raise
8 investment capital and to fulfill its potential in the first
9 place, Defendants Zaycon, Maresca, Giunta, Conrad and
10 Kremin decided to immediately terminate both
11 Braddock's employment and his status as Co-managing
12 Member of the Company.

13 . . .

14 114. To remove Braddock as Co-managing Member
15 under the Company's Operating Agreement, Defendants
16 Maresca, Giunta, Conrad and Kremin needed 80% of the
17 eligible Class A units to vote for Braddock's removal.

18 . . .

19 123. . . . Defendants manipulated the voting process that
20 resulted in the execution of the Consent by fraudulently
21 inducing certain Zaycon members to vote for Braddock's
22 removal, thereby improperly obtaining the 80% majority
23 necessary to oust Braddock as Comanaging Member
24 under the Operating Agreement.

25 124. Specifically, to get the signatures of other members
26 of Zaycon on the Consent, Defendants falsely and
27 fraudulently told them that Braddock was opposed to the
28 deal with Great Hill and that he would kill it.

29 125. In the case of Zaycon member Nathan Brown,
30 Conrad and Giunta each called him to urge him to vote
31 for the removal of Braddock on the alleged grounds that
32 Braddock would sabotage the deal with Great Hill. In
each instance, Brown withheld his consent. It was only
when he received a third call telling him that Braddock
was opposed to the deal with Great Hill—this one from

1 Shwarts—that Brown concluded that the allegations
2 against Braddock must be true and that he agreed to sign
3 the Consent.

4 (Zaycon Defendants’ SOF No. 7.) The Underlying Complaint alleges eight
5 causes of action, but does not formally bring a defamation cause of action. (*See*
6 Zaycon Defendants’ SOF No. 8.)
7

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10 After the initiation of the Underlying Suit, Mr. Braddock met with business
11 acquaintance Saverio Solimeo twice in New York City. (*See* Zaycon
12 Defendants’ SOF Nos. 9-10.) During the first meeting (January 22, 2017), Mr.
13 Braddock told Mr. Solimeo that his treatment by the Zaycon Defendants
14 slandered his business reputation and disparaged his image. (Zaycon
15 Defendants’ SOF No. 9.) Mr. Braddock concluded this first meeting by stating
16 that he was going to have to sue Zaycon to restore his reputation. (*Id.*) During
17 the second meeting (April 22, 2017), Mr. Braddock again stated the Zaycon
18 Defendants had damaged his, and that he believed Zaycon would fail, further
19 hurting his already damaged reputation. (Zaycon Defendants’ SOF No. 10.)
20 Mr. Braddock further indicated at the second meeting that his calculation of
21 damages for the Underlying Suit included the damage to his reputation caused
22 by the Zaycon Defendants. (*Id.*)
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1 Mr. Braddock was deposed in the Underlying Suit on November 15, 2017.
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 3 (Zaycon Defendants' SOF No. 11.) During this deposition, the following
 4 exchange occurred regarding statements made by the Zaycon Defendants to
 5
 6 Zaycon Member Nathan Brown:

8 [Question by attorney:] What did he tell you that he was
 9 told that was false?

10 [Answer by Mr. Braddock:] Well, the same false story
 11 that everyone else was told, that I was against the Great
 12 Hill deal and I was going to deep six it and that the deal
 13 was in the interest of the company, and if it didn't give—
 14 if I didn't get removed, it was going to go down.

15 (*Id.*)

16
 17 In its Motion for Summary Judgment, Cincinnati argues “the Underlying
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 19 Suit does not allege any claims that could conceivably fall within any of the
 20 coverage provided in the [Policies].” (ECF No. 16 at 2.) As it relates to
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 22 potential “personal and advertising injury” coverage, Cincinnati argues “[t]he
 23
 24 allegations in the Underlying Suit do not allege any slander, violation of
 25
 26 privacy, copyright infringement, or other ‘personal and advertising injury’
 27
 28 offense listed in Cincinnati’s Policies.” (*Id.* at 13.)

29 **MEMORANDUM OF LAW**

30
 31 The purpose of summary judgment is to avoid unnecessary trials.
 32
Northwest Motorcycle Ass'n v. U.S. Dept. of Agriculture, 18 F.3d 1468, 1471

(9th Cir. 1994). Summary judgment is warranted if the moving party demonstrates “that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). The moving party bears the initial burden of demonstrating the absence of any genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden then shifts to the non-moving party to identify specific genuine issues of material fact for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). In ruling upon a summary judgment motion, the court must construe the facts, as well as all rational inferences therefrom, in the light most favorable to the non-moving party. *Scott v. Harris*, 550 U.S. 372, 378 (2007).

A. Cincinnati Has a Duty to Defend the Zaycon Defendants Based Upon the Potential of Liability for a “Personal or Advertising Injury.”

Washington law has long established “that the duty to defend is different from and broader than the duty to indemnify.” *Am. Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 404, 229 P.3d 693 (2010). For an insured, “[t]he entitlement to a defense may prove to be of greater benefit than indemnity.” *Am. Best Food, Inc.*, 168 Wn.2d at 404; accord *Woo v. Fireman's Fund Ins.*

1 Co., 161 Wn.2d 43, 54, 164 P.3d 454, (2007) (“The duty to defend is . . . one of
2 the principal benefits of the liability insurance policy.”).

3
4 “The duty to defend ‘arises at the time an action is first brought, and is
5 based on *the potential for liability.*’” Woo, 161 Wn.2d at 52 (emphasis in
6 original) (quoting *Truck Ins. Exch. v. VanPort Homes, Inc.*, 147 Wn.2d 751,
7 760, 58 P.3d 276 (2002)). Pursuant to this broad duty to defend, “if there is any
8 reasonable interpretation of the facts or the law that could result in coverage,
9 the insurer must defend.” *Am. Best Food, Inc.*, 168 Wn.2d at 413. In other
10 words, any uncertainty regarding the duty to defend “works in favor of
11 providing a defense to an insured.” *Id.* at 408. The breadth of the duty to
12 defend is based upon the fiduciary duty owed by an insurer to its insured. *See*
13 *Truck Ins. Exch. of Farmers Ins. Grp. v. Century Indem. Co.*, 76 Wn. App. 527,
14 533, 887 P.2d 455 (1995).

15 Washington law dictates two general routes to trigger the duty to defend.
16 *See Woo*, 161 Wn.2d at 53. Under the first route, an insurer’s duty to defend
17 arises when the complaint “‘construed liberally, alleges facts which could, if
18 proven, impose liability upon the insured within the policy’s coverage.’” *Woo*,
19 161 Wn.2d at 52-53 (quoting *Truck Ins. Exch.*, 147 Wn.2d at 760). The proper
20 inquiry under this route is whether “it is at least *conceivable* that the complaint
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1 alleges facts which *could* make the complaint fall within the policy’s coverage.”
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 3 *Capitol Specialty Ins. Corp. v. Beach Eatery & Surf Bar, LLC*, 36 F. Supp. 3d
 4 1026, 1035 (E.D. Wash. 2014) (emphasis in original).
 5

6 Under the second route, “if it is not clear from the face of the complaint
 7 that the policy provides coverage, but coverage could exist, the
 8 insurer *must* investigate and give the insured the benefit of the doubt that the
 9 insurer has a duty to defend.” *Woo*, 161 Wn.2d at 53 (emphasis in original). In
 10 other words, “if ‘the allegations . . . are ambiguous or inadequate,’ facts outside
 11 the complaint may be considered” in determining the duty to defend. *Id.* at 54
 12 (quoting *Truck Ins.*, 147 Wn.2d at 761). Although extrinsic facts may be used
 13 to trigger the duty to defend, the “insurer may not rely on facts extrinsic to the
 14 complaint to deny the duty to defend.” *Woo*, 161 Wn.2d at 54.
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22 The Policies at issue provide that Cincinnati “will have the right and duty
 23 to defend the insured against any ‘suit’ seeking . . . damages” because of
 24 “personal and advertising injury.” (Zaycon Defendants’ SOF No. 2.) The
 25 Policies define “personal and advertising injury,” in pertinent part, as:
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29 Oral or written publication, in any manner, of material
 30 that slanders or libels a person or organization or
 31 disparages a person’s or organization’s goods, products
 32 or services.

1 (*Id.*) In the situation at hand, both the Underlying Complaint, construed
 2 liberally in favor of the Zaycon Defendants, and facts extrinsic to the
 3 Underlying Complaint, establish Cincinnati owes the Zaycon Defendants the
 4 duty to defend based upon the potential liability for a “personal and advertising
 5 injury” of defamation. *See Woo*, 161 Wn.2d at 52-53.

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 10 Defamation seeks to compensate the injured party for damages caused to
 11 his or her reputation. *See Capitol Specialty Ins. Corp. v. Beach Eatery & Surf*
 12 *Bar, LLC*, 36 F. Supp. 3d 1026, 1037 (E.D. Wash. 2014). Slander is
 13 defamation by the spoken word. *Life Designs Ranch, Inc. v. Sommer*, 191 Wn.
 14 App. 320, 341, 364 P.3d 129 (2015). Under Washington law, defamation
 15 requires that the injured party prove: “(1) a false statement, (2) publication, (3)
 16 fault, and (4) damages.” *Duc Tan v. Le*, 177 Wn.2d 649, 662, 300 P.3d 356
 17 (2013). “The burden of proof on the element of fault depends on the nature of
 18 the defamed party.” *Demopolis v. Peoples Nat. Bank of Wash.*, 59 Wn. App.
 19 105, 108 n. 1, 796 P.2d 426 (1990). When the defamed party is a “public
 20 figure,” he or she must show that the defamatory statement was made with
 21 “actual malice”— “that is, knowledge of falsity or reckless disregard of the
 22 truth or falsity of the allegedly defamatory statements.” *Vern Sims Ford, Inc.*
 23 *v. Hagel*, 42 Wn. App. 675, 678, 713 P.2d 736 (1986). However, if the

1 defamed party is a “private figure,” only negligence need be shown.

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3 *Demopolis*, 59 Wn. App. at 108 n. 1.

4 First, the Underlying Complaint alleges multiple facts that conceivably
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6 lead to the Zaycon Defendants’ liability for damages for defamation
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8 surrounding the Zaycon Defendants’ alleged ouster of Mr. Braddock in
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10 conjunction with the Great Hill deal. *See Woo*, 161 Wn.2d at 52-53.

11 Specifically, the Underlying Complaint alleges:
12

13 91. Braddock advised Defendants and Vertical and
14 Shwarts that he believed that the Great Hill deal could be
15 improved through negotiation but that he was strongly in
16 favor of coming to terms with Great Hill.

17 . . .

18 123. . . . Defendants manipulated the voting process that
19 resulted in the execution of the Consent by fraudulently
20 inducing certain Zaycon members to vote for Braddock’s
21 removal, thereby improperly obtaining the 80% majority
22 necessary to oust Braddock as Comanaging Member
23 under the Operating Agreement.

24 124. Specifically, to get the signatures of other members
25 of Zaycon on the Consent, Defendants falsely and
26 fraudulently told them that Braddock was opposed to the
27 deal with Great Hill and that he would kill it.

28 (Zaycon Defendants’ SOF No. 7 (underlining added).) Moreover, as it relates
29
30 to Zaycon member Nathan Brown, the Underlying Complaint alleges “Conrad
31
32 and Giunta each called him to urge him to vote for the removal of Braddock on

1 the alleged grounds that Braddock would sabotage the deal with Great Hill.”

2
3 (*Id.*)

4 Second, outside the factual allegations of slander in the Underlying
5 Complaint, Cincinnati has the obligation to consider extrinsic facts and to give
6 the Zaycon Defendants the benefit of the doubt in determining whether to
7 defend. *See Woo*, 161 Wn.2d at 53. Mr. Solimeo met with Mr. Braddock after
8 the initiation of the Underlying Suit, where Mr. Braddock twice indicated that
9 the Zaycon Defendants’ actions surrounding the Underlying Suit slandered his
10 reputation and damaged his image. (*See Zaycon Defendants’ SOF Nos. 9-10.*)

11 At the end of the second meeting, Mr. Braddock indicated his calculation of
12 damages for the Underlying Suit included the damages to his reputation.
13 (Zaycon Defendants’ SOF No. 10.) Furthermore, when Mr. Braddock was
14 deposed in the Underlying Suit, he indicated the Zaycon Defendants told
15 Zaycon members (specifically Nathan Brown) “the same false story that
16 everyone else was told, that I was against the Great Hill deal and I was going to
17 deep six it and that the deal was in the interest of the company, and if it didn’t
18 give—if I didn’t get removed, it was going to go down.” (Zaycon Defendants’
19 SOF No. 11.)

1 While the Underlying Complaint does not formally state a cause of action
2 for defamation, factual allegations contained in the Underlying Complaint,
3 along with extrinsic facts, demonstrate that Mr. Braddock claims that the
4 Zaycon Defendants communicated false facts about him to shareholders to
5 remove him as manager and terminate his employment as CEO, thus causing
6 damage to his reputation. *See Duc Tan*, 177 Wn.2d at 662 (discussing elements
7 of defamation).² This is sufficient to trigger the duty to defend based upon the
8 Zaycon Defendants' potential liability for damages relating to a "personal or
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15 ² During his deposition, Mr. Braddock indicated that he thought the Zaycon
16 Defendants did not believe the defamatory statements were false at the time
17 they were communicated to shareholders. (*See* Zaycon Defendants' SOF No.
18 11.) Rather, Mr. Braddock indicated that the Zaycon Defendants conspired to
19 oust him from Zaycon and relied on information provided by an individual
20 potentially hostile to him (Michael Shwarts). (*Id.*) Giving the Zaycon
21 Defendants the benefit of the doubt for coverage, this alleged fault satisfies the
22 negligence standard if Mr. Braddock is a "private figure," and conceivably the
23 "actual malice" standard of reckless disregard if Mr. Braddock is a "public
24 figure." *See Duc Tan*, 177 Wn.2d at 669.
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1 advertising injury.” *See Woo*, 161 Wn.2d at 52-53. As such, Cincinnati has a
 2 duty to defend the Zaycon Defendants in the Underlying Suit as a matter of law.
 3

4 ***B. Determination of the Duty to Indemnify is Premature.***
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6 Cincinnati also moves for summary judgment on its duty to indemnify the
 7 Zaycon Defendants for any potential loss. Under Washington law, an insurer’s
 8 duty to indemnify “‘hinges on the insured’s *actual liability* to the claimant
 9 and *actual coverage* under the policy.’” *Woo*, 161 Wn.2d at 53 (emphasis in
 10 original) (quoting *Hayden v. Mut. of Enumclaw Ins. Co.*, 141 Wn.2d 55, 64, 1
 11 P.3d 1167 (2000)). The duty to indemnify arises “only where the injured party
 12 ultimately prevails [against the insured] on facts which fall within the policy
 13 coverage.” *Safeco Ins. Co. of America v. McGrath*, 42 Wn. App. 58, 61, 708
 14 P.2d 657 (1985).
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22 As the Zaycon Defendant’s actual liability in the Underlying Suit has not
 23 yet been determined, a decision regarding Cincinnati’s duty to indemnify is
 24 premature. *See Allstate Prop. & Cas. Ins. Co. v. Giroux*, 2016 WL 3632490, at
 25 *4 (W.D. Wash. July 7, 2016) (declining to decide the duty to indemnify in a
 26 declaratory judgment action as the insured’s “actual liability in the underlying
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1 suit has not yet been determined”³; *accord McGrath*, 42 Wn. App. at 61.
 2
 3 Following this reasoning, the plaintiff in the Underlying Suit (Mr. Braddock)
 4 can still amend the Underlying Complaint to formally add a defamation cause
 5 of action against the Zaycon Defendants that would be covered under the
 6 Policies. *See* Fed. R. Civ. P. 15(a)(2) (prior to trial a party may amend its
 7 pleading by leave of court, which should be freely given “when justice so
 8 requires”).
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13 As actual liability on the Underlying Suit has not yet been determined,
 14 and any potential duty to indemnify has not yet arisen, summary judgment
 15 determination of Cincinnati’s duty to indemnify the Zaycon Defendants is
 16 improper at this juncture.
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20 ***C. The Zaycon Defendants Are Entitled to Attorneys’ Fees.***
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22 Under Washington law, “an award of fees is required in any legal action
 23 where the insurer compels the insured to assume the burden of legal action, to
 24 obtain the full benefit of his insurance contract.” *Olympic S.S. Co. v.*
 25 *Centennial Ins. Co.*, 117 Wn.2d 37, 53, 811 P.2d 673 (1991). This rule applies
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30 ³ The Zaycon Defendants cite to this unpublished case pursuant to LR 7.1(f)(2)
 31 for persuasive purposes only.
 32

1 “where the insurer forces the insured to litigate questions of coverage.”
 2
 3 *McGreevy v. Oregon Mut. Ins. Co.*, 128 Wn.2d 26, 33 n. 4, 904 P.2d 731
 4 (1995). An award of attorneys’ fees under *Olympic Steamship Co.* is
 5 appropriate after there has been a judicial determination that the insured has
 6 prevailed on the coverage issue. *See Alaska Nat. Ins. Co. v. Bryan*, 125 Wn.
 7 App. 24, 36, 104 P.3d 1 (2004).
 8
 9

10
 11 As indicated above, Cincinnati has a duty to defend the Zaycon
 12 Defendants for a potential “personal or advertising injury” under the Policies.
 13
 14 *See Woo*, 161 Wn.2d at 52-53. Although Cincinnati has defended the Zaycon
 15 Defendants under a reservation of rights, it brought this summary judgment
 16 proceeding for a determination of coverage under the Policies. The Zaycon
 17 Defendants have been forced to litigate the issue of coverage, and are thereby
 18 entitled to *Olympic Steamship* attorneys’ fees if this Court determines that
 19 Cincinnati owes the Zaycon Defendants a duty to defend under the Policies.
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26 CONCLUSION

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 28 For the foregoing points and authorities, the Zaycon Defendants
 29 respectfully request that this Court deny Plaintiff’s Motion for Summary
 30 Judgment, grant their Motion for Summary Judgment on the duty to defend, and
 31 award them reasonable attorneys’ fees.
 32

1 RESPECTFULLY SUBMITTED this 4th day of January, 2018.

2
3 ETTER, McMAHON, LAMBERSON,
4 VAN WERT & ORESKOVICH, P.C.

5 By: /s/ Carl J. Oreskovich

6 Carl J. Oreskovich, WSBA #12779

7 Attorney for Zaycon Defendants
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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of January, 2018, I electronically filed the following documents:

**ZAYCON DEFENDANTS' CROSS-MOTION FOR SUMMARY
JUDGMENT ON DUTY TO DEFEND AND RESPONSE TO
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

with the Clerk of the Court using the CM/ECF System, which will send electronic notification of such filing to the following:

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